EX PARTE OR LATE FILED

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March 4, 1994 (202) 434-4210

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

VIA HAND DELIVERY

RECEIVED
MAR - 4 1994
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Written Ex Parte Presentation
MM Docket No. 92-265
Program Access Proceeding

Dear Chairman Hundt:

Enclosed for your review please find a written ex parte presentation by our client, the National Rural Telecommunications Cooperative ("NRTC"), in response to a previous ex parte presentation by United States Satellite Broadcasting Co., Inc. ("USSB") in the above-referenced proceeding.

USSB has entered into exclusive program distribution arrangements with Time Warner and Viacom. The USSB/Time Warner/Viacom deal provides exclusivity to USSB from two major vertically integrated cable programmers, specifically for the purpose of blocking competition by NRTC and other Direct Broadcast Satellite ("DBS") distributors seeking to provide service to areas unserved by cable operators. This exclusivity arrangement is contrary to the letter and spirit of the Program Access provisions of the Cable Act, and it must be prohibited by the Commission's rules.

We look forward to discussing these issues with you personally in the future. Meanwhile, should you have any questions or concerns, please feel free to contact the undersigned.

Sincerely,

John B Richards

John B. Richards

Enclosure

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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March 4, 1994

EX PARTE NOTICE

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary,
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Ex Parte Presentation
MM Docket No. 92-265
Program Access Proceeding

Dear Mr. Caton:

In accordance with Section 1.1206 (a)(1) of the Commission's rules, please find enclosed for inclusion in the public record of the above-captioned proceeding two copies of a written ex parte presentation made this date by the undersigned on behalf of our client, the National Rural Telecommunications Cooperative ("NRTC"), to the following Commission officials:

The Honorable Reed E. Hundt
Chairman

The Honorable James H. Quello
Commissioner

The Honorable Andrew C. Barrett
Commissioner

Merrill Spiegel
Special Assistant
Office of the Honorable Reed E. Hundt

Brian F. Fontes
Special Advisor
Office of the Honorable James H. Quello

Byron F. Marchant
Senior Legal Advisor
Office of the Honorable Andrew C. Barrett

James R. Coltharp
Special Advisor
Office of the Honorable Andrew C. Barrett

Roy J. Stewart
Chief, Mass Media Bureau

William H. Johnson
Deputy Chief, Mass Media Bureau

Alexandra Wilson
Acting Chief, Cable Services Bureau

Bruce A. Romano
Deputy Chief, Policy and Rules Division
Mass Media Bureau

James W. Olson
Chief, Competition Division
Cable Services Bureau

Diane L. Hofbauer
Director, Program Access
Cable Services Bureau

Two copies of a sample cover letter transmitting these materials to Chairman Hundt are also enclosed for the record. Cover letters to the other Commission officials are identical, with the exception of the names and addresses of the addressees.

Should you have any questions or require any additional information, please feel free to contact the undersigned.

Sincerely,

John B Richards

John B. Richards

Enclosures

cc: Commission officials listed above

EX PARTE OR LATE FILED

RECEIVED

MAR - 4 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

ORIGINAL

In the Matter of	)	
	)	**MM Docket No. 92-265**
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

To: The Commission

SECOND EX PARTE PRESENTATION BY THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

B.R. Phillips, III
Chief Executive Officer
National Rural Telecommunications Cooperative

John B. Richards
Keller and Heckman
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
(202) 434-4210

Its Attorneys

Dated: March 4, 1994

TABLE OF CONTENTS

SUMMARY

United States Satellite Broadcasting Co., Inc. ("USSB") has entered into exclusive program distribution arrangements with two vertically integrated cable programmers, Time Warner and Viacom. The USSB/Time Warner/Viacom deal provides exclusivity to USSB specifically for the purpose of blocking access to Time Warner's and Viacom's programming (e.g., HBO, Showtime, etc.) by the National Rural Telecommunications Cooperative ("NRTC") and other Direct Broadcast Satellite ("DBS") distributors seeking to provide DBS service in areas unserved by cable operators.

The Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act") was adopted by Congress to curb cable industry abuses. USSB's construction of the statute (i.e., that cable operators are prohibited from entering into exclusive arrangements, but vertically integrated cable programmers such as Time Warner and Viacom are free to do so) is contrary to the express language of Section 628(c)(2)(C) of the Cable Act, the relevant legislative history and the public policies supporting full and open Program Access for all multichannel video programming distributors.

According to USSB, any vertically integrated cable programmer could lawfully enter into an exclusive arrangement with one favored multichannel video programming distributor per technology: one C-band distributor, one MMDS

distributor, one SMATV distributor, one DBS distributor (i.e., USSB). Competition from other distributors using the same distribution technology would be blocked.

There is no indication in the Cable Act, however, that Congress would be satisfied with access to programming by only one distributor per technology, as USSB claims. One-distributor-per-technology is not "competition" in the video programming marketplace, and it is not what Congress envisioned in adopting strong Program Access requirements. Congress intended to and did create a level playing field, so that all distributors, not just USSB, could have access to a wide variety of cable programming for delivery to the American public.

USSB has no statutory right to block competition from what it calls its "direct competitors." Congress intended just the opposite result. Congress mandated full competition through fair access to programming on a technology neutral basis.

The Commission should reconsider its rule [47 C.F.R. 76.1002(c)(1)] implementing Section 628(c)(2)(C) of the Cable Act and prohibit all arrangements by vertically integrated cable programmers that prevent a multichannel video programming distributor from obtaining programming for distribution to persons in areas not served by a cable operator.

RECEIVED

MAR - 4 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	**MM Docket No. 92-265**
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

To: The Commission

SECOND EX PARTE PRESENTATION BY THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

Pursuant to Section 1.1206 of the Commission's rules, the National Rural Telecommunications Cooperative ("NRTC"), by its attorneys, hereby submits this Second Ex Parte Presentation in response to a recent Ex Parte Presentation by United States Satellite Broadcasting Co., Inc. ("USSB") in the above-captioned proceeding.1/ From beginning to end, the USSB Ex Parte Presentation is a personalized attack on NRTC. It is replete with countless unsubstantiated and

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1/ See, USSB's "Ex Parte Response to Ex Parte Presentation by the National Rural Telecommunications Cooperative," (hereinafter USSB Ex Parte Presentation or "USSB"), filed with the Secretary on January 24 and February 3, 1994 (Public Notice Nos. 41730 and 41815, February 11 and 22, 1994, respectively).

false allegations of misrepresentation, fraud and other abuses by NRTC. It is apparently designed to divert the Commission's attention from the serious legal and policy issues raised by USSB's exclusive program distribution arrangement with Time Warner and Viacom. The USSB/Time Warner/Viacom deal provides exclusivity to USSB from two major vertically integrated cable programmers, specifically for the purpose of blocking competition by NRTC and other Direct Broadcast Satellite ("DBS") distributors. This exclusivity arrangement is contrary to the letter and spirit of the Program Access provisions of the Cable Act, and it must be prohibited by the Commission's rules.

I. Background

1. On November 19, 1993, NRTC presented its first written ex parte presentation in this proceeding.2/ NRTC argued that the statutory ban against exclusive program distribution arrangements in areas unserved by cable [47 USC 548(c)(2)(C)] applies to vertically integrated cable programmers, such as Time Warner and Viacom, as well as to cable operators. NRTC urged the Commission

2/ Ex Parte Presentation by the National Rural Telecommunications Cooperative, MM Docket No. 92-265, November 19, 1993; First Report and Order, 8 F.C.C.R. 3359 (April 30, 1993); Petition for Reconsideration of the National Rural Telecommunications Cooperative, MM Docket No. 92-265, June 10, 1993; Reply of the National Rural Telecommunications Cooperative, MM Docket No. 92-265, July 28, 1993.

to reconsider its adoption of 47 C.F.R. 76.1002(c)(1) and to bring the rule into conformance with the statute.

2. NRTC noted that USSB had entered into exclusive arrangements with Time Warner and Viacom for the distribution of HBO, Showtime and other programming throughout the country. No other DBS distributors can obtain the same programming from Time Warner or Viacom at any price. NRTC argued that the USSB/Time Warner/Viacom exclusivity arrangement was anticompetitive and prohibited by the Program Access requirements of the Cable Act.

3. In January and February of 1994, USSB filed its ex parte response to NRTC's presentation. It is a lengthy (95 page) attack on the credibility and integrity of NRTC. Rather than addressing the anticompetitive issues obviously raised by USSB's exclusive programming arrangement with Time Warner and Viacom, USSB chose to focus on irrelevant and false charges against NRTC that are apparently designed to divert the Commission's attention from the USSB/Time Warner/Viacom deal.

4. USSB's relentless rhetoric and its unfounded allegations of misconduct by NRTC continue unabated throughout its ex parte filing. In fact, there is very little in USSB's filing that is not based on wild accusations of misrepresentation,

fraud or similar misconduct by NRTC. Even FCC Chairman Hundt did not escape the broad brush of USSB's innuendo.3/

II. NRTC Response to USSB Ex Parte Filing

5. NRTC stands by the accuracy and truthfulness of the statements contained in its ex parte presentation. Although NRTC will not respond to each of the multitude of unfounded allegations made by USSB, a sampling of USSB's accusations are addressed below.

6. Initiation of DBS Service. USSB alleges that NRTC somehow "misleadingly" made a statement which "suggests" that USSB will initiate DBS service at some point "after" DirecTv. (USSB, pp. 4-5). It is a matter of public record in this proceeding, however, as reiterated by both USSB and NRTC in their respective ex parte presentations, that DirecTv, NRTC and USSB are scheduled to launch DBS service in 1994 utilizing the same satellite. The Commission, its staff, USSB, NRTC and DirecTv are already well aware of this fact. (NRTC, p. 2). Nothing to the contrary was ever "suggested" by NRTC.

7. USSB Proposal. USSB claims some type of impropriety by NRTC in not disclosing USSB's "Proposal For Qualified Franchisees of the National Rural

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3/ USSB, p. 7, n. 4.

Telecommunications Cooperative to be Limited Non-exclusive 'Sales Agents' for USSB-distributed DBS Programming Services," which was pending at the time of NRTC's ex parte presentation. (USSB, p. 17, n. 12). In fact, pursuant to a Confidentiality Agreement with USSB, NRTC was bound not to disclose the terms and conditions of USSB's proposal. Moreover, USSB's proposal was rejected by NRTC for a number of legitimate reasons, not the least of which was its inconsistency with the Cable Act. As a multichannel video programming distributor in its own right, NRTC has a statutory right of access to programming from vertically integrated cable programmers, such as Time Warner and Viacom. 47 U.S.C. 548(c)(2)(B) and (c)(2)(C). NRTC is not obliged, under the law, to become a "Sales Agent" for USSB.

8. USSB/Time Warner/Viacom. USSB repeatedly claims that NRTC somehow "misleadingly characterized" or "misrepresented" USSB's relationship with Viacom and Time Warner by referring to the "USSB/Time Warner/Viacom" exclusivity arrangement. (USSB, p. 2., p. 17 n. 12). USSB admits, however, that it has exclusivity arrangements with Time Warner and Viacom that block other DBS distributors, such as DirecTv and NRTC, from obtaining HBO, Showtime and other programming for distribution over DBS.[4/] (USSB, pp. 2-3). USSB

4/ Contrary to USSB's accusations, NRTC neither sought nor received exclusive programming distribution arrangements from vertically integrated cable programmers, either directly or through DirecTv. (USSB, p. 30).

does not deny the substance or effect of the relationship with Time Warner and Viacom, but only quibbles with the shorthand terminology used to describe it.[5/]

9. Primestar. USSB claims that NRTC somehow mischaracterized the Primestar matter. (USSB, pp. 31-32). In fact, USSB took statements made by the Honorable John Sprizzo during the Primestar hearing and presented them to the Commission in support of USSB's argument that the Cable Act permits "competitive exclusivity."[6/] This attempt by USSB to bootstrap the Primestar proceeding into the FCC proceeding is precisely what Judge Sprizzo cautioned all participants in the Primestar proceeding, including USSB, not to do:

> Whatever I have done in approving this decree is not in any way a finding by this Court that any conduct challenged in the future, either in the Courts or at the FCC in an administrative hearing, is lawful by virtue of the fact that the Court has signed this decree. (Trans. p. 48)
>
> If I approve this decree, I am indicating no opinion whatsoever in any shape, manner or form with respect to whether exclusive contracts do or do not conform with the Cable Act. (Trans., p. 22)
>
> There is nothing in this decree that binds the FCC in any way or binds you in any way, nor should any finding I make in approving this decree be taken in any shape, manner or form as any

5/ The "USSB/Time Warner/Viacom" arrangement has been a matter of public record with the Commission since at least last July. (See, e.g., Opposition of Viacom, p. 7, n. 4; NRTC Reply, pp. 2-3).

6/ See, "The USSB View of Program Exclusivity in the DBS Marketplace," MM Docket No. 92-265, Sept. 28, 1993 at pp. 4-5; USSB, p. 4.

> imprimatur of approval or any suggestion that the particular exclusive contracts are lawful or unlawful. (Trans., p. 23)
>
> If I choose to approve this decree, as I think I will, I am not suggesting in any shape, manner or form that exclusive contracts with orbital providers or the price determinations are lawful. I will say that for the record, so that if they try to use it, you can say Judge Sprizzo has said specifically that, in approving the decree, he is adhering to principles of federalism and therefore allowing the State Attorneys General to decide what they think to be appropriate, without unnecessary judicial interference. (Trans., p. 30)

10. Having blatantly disregarded the Judge's admonitions, USSB nonetheless accuses NRTC of "falsely" characterizing USSB's use of the Primestar decree (USSB, pp 31-32). There is nothing "false" about NRTC's characterization of USSB's handling of the Primestar matter. USSB clearly took Judge Sprizzo's remarks out of context and then used them at the Commission to support USSB's construction of the Cable Act, an approach specifically disavowed by the Judge on the record of the Primestar proceeding.

11. The remainder of USSB's allegations fall into the same category: false, unsubstantiated and personalized accusations against NRTC, which are designed apparently for no other reason than to obscure the legal and policy issues raised by USSB's exclusive arrangement with two major vertically integrated cable programmers.

12. The Cable Act was adopted by Congress to curb cable industry abuses. USSB's construction of the statute (i.e., that cable operators are prohibited from entering into exclusive arrangements, but vertically integrated cable programmers are free to do so) violates the letter and spirit of the Cable Act, the relevant legislative history and the public policies supporting full and open Program Access for all multichannel video programming distributors.

1. The USSB/Time Warner/Viacom Exclusivity Arrangement is Prohibited by Section 628(c)(2)(C) of the Cable Act.

13. NRTC's Petition for Reconsideration concerns only the Commission's rule [47 C.F.R. 76.1002(c)(1)] implementing Section 628(c)(2)(C) of the Cable Act, regarding the provision of programming service in areas unserved by cable operators. USSB and NRTC differ in their respective interpretations of this section of the Cable Act in only one material respect: NRTC says that all exclusive arrangements are prohibited, including those involving cable operators, while USSB says that only exclusive arrangements involving cable operators are prohibited.

14. Section 628(c)(2)(C) states, in regard to the distribution of programming to areas unserved by cable, that the FCC's rules must:

> prohibit practices, understandings, arrangements, and activities, including exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor or satellite broadcast programming vendor, that prevent a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a cable operator has an attributable interest or any satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of the date of enactment of this section. 47 U.S.C. 548(c)(2)(C).

15. With respect to the distribution of programming to persons in areas served by cable, the FCC's rules must:

> . . .prohibit exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, unless the Commission determines (in accordance with paragraph (4)) that such contract is in the public interest. 47 U.S.C. 548(c)(2)(D).

16. As a result of the significant difference in the language of these two subsections, NRTC argued in its *ex parte* presentation that 2(C) prohibits *all* exclusive arrangements in areas unserved by cable (*including* exclusive

arrangements involving cable operators), while 2(D) prohibits only certain exclusive contracts involving cable operators in areas served by cable.7/

17. USSB claims, however, that there is "absolutely nothing" to support NRTC's different readings of subsections 2(C) and 2(D), because there are only "slight differences" in the wording of these two subsections (USSB, pp. 12-15, 24). In fact, the language of the two subsections is markedly different! The former is couched in terms of prohibiting all exclusive arrangements in areas unserved by cable, including exclusive contracts with cable operators.8/ The latter prohibits only certain exclusive contracts with cable operators in areas served by cable.9/ There is ample justification to read these two subsections differently, because they are worded differently. The prohibitions in Subsection 2(C) (unserved areas) are clearly much broader than those in Subsection 2(D) (served areas).

7/ Other sections of the Cable Act, including Sections 628(b) and 628(c)(2)(B), also appear to prohibit exclusivity arrangements such as the USSB/Time Warner/Viacom deal.

8/ Section 628(c)(2)(C) refers broadly to all "practices, understandings, arrangements, and activities" that prevent a distributor from obtaining programming. The single phrase between the two commas (i.e., "including exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor or satellite broadcast programming vendor," emphasis added) is only one example of the type of conduct that is prohibited.

9/ Section 628(c)(2)(D), in fact, does not refer to anything but exclusive contracts between a cable operator and vertically integrated programmers.

18. The debate between USSB and NRTC concerning the proper interpretation of the statute boils down to the use of the word "including" within the context of the prohibitions contained in Section 628(c)(2)(C). USSB effectively writes the word out of the statute and claims that only exclusives with cable operators are prohibited.10/ NRTC takes the word at face value and argues that exclusive arrangements involving cable operators are but one type of exclusive arrangement prohibited by the statute.

19. As a principle of statutory construction, the term "including" within a statute is interpreted as a word of enlargement or illustrative application. The Supreme Court has determined that "includes" enlarges the scope of a statute rather than limits it. In Federal Land Bank v. Bismarck Lumber Co., 314 U.S. 95, 100 (1941), the Supreme Court explained that the term "including" is not one of "all-embracing definition, but connotes simply an illustrative application of the general principle." See also Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 189 (1941); Helvering v. Morgan's, Inc., 293 U.S. 121, 125 (1934); American Surety Co. of New York v. Marrota, 287 U.S. 513 (1933). Other courts routinely have adhered to this same common sense interpretation of the term "include." See

10/ In essence, USSB attempts to re-write the statute on its own motion, by inserting a comma after the phrase ", including exclusive contracts for satellite cable programming or satellite broadcast programming" and making other structural changes in the phraseology of Section 628(c)(2)(C). Only in that distorted way could USSB possibly conclude that the statute governs only cable operator conduct.

American Fed. of Television & Radio Artists v. NLRB, 462 F.2d 887, 890-91 (D.C. Cir. 1972) (the term "includes" in National Labor Relations Act is a term of enlargement, not of limitation); Exxon Corp. v. Lujan, 730 F. Supp. 1535, 1545 (D. Wyo. 1990) aff'd 790 F.2d 757 (10th Cir. 1992) (the word "includes" indicates that what follows is a nonexclusive list which may be enlarged upon); see also 11 U.S.C. § 102(3) ("includes" and "including" are not limiting).

20. Contrary to USSB's arguments, nothing in Section 628(c)(2)(C) states that only exclusive arrangements involving cable operators are prohibited. Other exclusive arrangements, including those involving vertically integrated cable programmers, are prohibited, as well. USSB's exclusive arrangement with Time Warner and Viacom very definitely runs afoul of this broad statutory prohibition.

2. The Legislative History Supports a Ban on All Exclusive Arrangements in Unserved Areas.

21. The straightforward statutory language of Subsection 628(c)(2)(C) is controlling and would supersede any conflicting legislative history. See, Chevron U.S.A. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984). In this instance, however, there is no compelling legislative history to the contrary. USSB points only to language recognizing, as NRTC does, that exclusive contracts between a cable operator and a programming vendor are prohibited by this section. H.R. Conf. Rep. No. 102-862 102d Cong, 2nd Sess. at 92 (1992); See,

e.g., Opposition of USSB, pp. 7-8, USSB Ex Parte Presentation, p. 23. Nothing in the Conference Report, however, states that Congress intended to prohibit only exclusive arrangements between cable operators and programmers. As the Supreme Court has noted, "...the language of a statute -- particularly language expressly granting an agency broad authority -- is not to be regarded as modified by examples set forth in the legislative history." Pension Benefit Guarantee Corp. v. LTV Corp., 110 S. Ct. 2668, 2677 (1990).

22. To the extent legislative history and floor debate is relevant, however, it supports NRTC's, not USSB's, construction of the statute. USSB's reliance on statements by the Honorable Billy Tauzin, sponsor of the Program Access provisions, to support its interpretation of the statute is particularly misplaced. (USSB, p. 15, n. 15).

23. USSB claims that Representative Tauzin did not intend to prevent DBS and other multichannel video programming distributors from entering into exclusive contracts with vertically integrated programmers. Representative Tauzin, however, is already on record in the Primestar proceeding as opposing the very interpretation of the statute that USSB asserts in this proceeding. In his letter to Judge Sprizzo, Representative Tauzin made it clear that he was extremely concerned that any settlement in the Primestar matter not allow an "exclusive contract with a high-power DBS operator at the 101 degree orbital

position effectively permitting the Primestar Partners to prevent any other DBS operator at that orbital position from obtaining the programming controlled by Primestar and its partners."11/ This type of exclusivity, of course, is represented by the USSB/Time Warner/Viacom deal. It is exactly the type of exclusivity the Tauzin Amendment was designed to prohibit.

24. Should further "legislative history" be relevant to disposing of any uncertainties regarding Congressional intent in adopting Representative Tauzin's Program Access Amendment, the following excerpts from the July 23, 1992, floor debate prior to House passage of the Tauzin Amendment should remove any doubt.12/ The Tauzin Amendment was adopted after a weaker amendment offered by Representative Manton was rejected on the grounds that the Manton Amendment would not prohibit discrimination or allow open access to programming for cable's competitors. The Manton Amendment was supported by cable monopolists and by USSB.13/ After House passage of the Tauzin

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11/ See, Letter from the Honorable Billy Tauzin, to the Honorable John Sprizzo, June 16, 1993, NRTC Reply, supra, Attachment A, a copy of which is attached hereto.

12/ Emphasis added throughout.

13/ USSB claims that "NRTC falsely states that 'USSB unsuccessfully lobbied on the side of the cable programmers in opposing the program access provisions of the Cable Bill.'" (USSB, p. 2, n. 1). As reflected clearly in the Congressional Record, however, USSB and "giant (cable) monopolists" supported the Manton Amendment, which was defeated in favor of the more stringent Tauzin Amendment. Cf., 138 CONG. REC. 6535, 6541 (daily ed. July 23, 1992).

Amendment, it was accepted by the House and Senate with no substantive modifications.

25. During the floor debate, the remarks of Mr. Manton and supporters of his Amendment make clear their concern that the Tauzin Amendment would "go too far" by barring exclusive arrangements in the cable industry:14/

> **Mr. Manton** (AGAINST): Mr. Chairman, the Manton-Rose amendment offers the House a clear choice between our reasonable and balanced approach to program access and the far reaching, radical approach taken by my friend from Louisiana, [Mr. Tauzin]. ... Mr. Chairman, the Tauzin amendment would require that all video distributors obtain programming at a Government regulated wholesale price. The Tauzin amendment is not about access, it's about wholesale price regulation. .... Mr. Chairman, exclusive contractual arrangements play an important and beneficial role in the multichannel video marketplace. The recognition of exclusive rights gives programmers and cable operators an incentive to invest in new and improved programming, thereby increasing the quality of diversity of programming available to consumers. Barring exclusive arrangements will have a chilling effect on the development of new products. 138 CONG. REC. 6535 (daily ed. July 23, 1993)
>
> **Mr. Fields** (AGAINST): Mr. Chairman, the Tauzin amendment is regulatory overkill. It would force cable programmers to sell their product to any competitor at a Government-regulated price.... The Tauzin amendment would deny cable programmers the right to differentiate their wholesale price. ... The Tauzin amendment is so restrictive on the issue of exclusive contracts that it would essentially deny these types of arrangements. 138 CONG. REC. 6536 (daily ed. July 23, 1993)

14/ The President of USSB even wrote to the Energy and Commerce Committee Chairman and complained, according to Mr. Manton, that the Tauzin Amendment "goes too far." 138 CONG. REC. 6535 (daily ed. July 23, 1992).

Mr. Schaefer (AGAINST): I cannot honestly say that I blame cable's current and future competitors for wanting access to that which has made cable television an enormous success. .... The Manton amendment, on the other hand, recognizes the benefits of exclusive distribution arrangements ... 138 CONG. REC. 6537 (daily ed. July 23, 1993)

Mr. Richardson (AGAINST): The Tauzin amendment will take away a right from cable programmers that is given to everyone else in the entertainment industry: the right to control the use of their intellectual property. .... If the Tauzin amendment passes, who in their right mind is going to risk their money in a programming idea. Because in the world envisioned by the gentleman from Louisiana, if your programming idea turns out to be a flop-too bad. And if it turns out to be a success, well then the Federal Government will step in and mandate that you sell it on certain terms, conditions and prices. .... Why is it then that cable programming cannot enter into the same lawful exclusive contract arrangements as their competitors can for future programming investments. That is simply unfair, and represents nothing more than a punitive attack on the cable industry. 138 CONG. REC. 6539, 6540 (daily ed. July 23, 1993)

Mr. Berman (AGAINST): The amendment of the gentleman from Louisiana ... by barring exclusive distribution agreements even absent a showing of anti-competitive conduct, and by forcing the sale of programming at, in essence, uniform national prices, the amendment creates enormous new problems ... Program owners devote enormous creative powers and invest significant financial resources in their products. In marketing those product, it is only fair that they seek to get the best price they can. Denying them the ability to enter into exclusive contracts necessarily means that they cannot get top dollar from their customers. 138 CONG. REC. 6541 (daily ed. July 23, 1993)

Mr. Scheuer (AGAINST): Without a program access section, this legislation will not stimulate real competition to the cable monopoly. However, we must protect program access while also preserving the right of programmers to control their product. The Rose-Manton amendment will achieve both goals; the Tauzin amendment will not. 138 CONG. REC. 6540 (daily ed. July 23, 1993)

26. **Comments by supporters of the Tauzin Amendment make clear that the concerns of those supporting the Manton Amendment were justified. The Tauzin Amendment clearly was intended to prohibit exclusive arrangements in the cable industry:**

> **Mr. Eckart** (FOR): The cable industry has never been accused of being dumb. ... They know that if they maintain their stranglehold on this programming, they can shut down competition .... Mr. Tauzin's amendment is the only way that free and fair competition will be possible in this industry. 138 CONG. REC. 6540 (daily ed. July 23, 1993)
>
> **Mr. Lancaster** (FOR): New technologies, such as wireless cable and direct broadcast satellite are ready to compete with cable. These competing technologies want to offer similar channel selections at competitive prices. But the cable industry has done everything in its power to keep these competitors from getting off the ground. Cable programmers, who also own local cable companies, have denied competing technologies access to their programming -- either by refusing to sell or by charging ridiculously high prices. 138 CONG. REC. 6539 (daily ed. July 23, 1993)
>
> **Mr. Harris** (FOR): Vertically integrated cable companies have the ability to choke off these potential competitors by keeping a stranglehold over programming. The Tauzin amendment addresses these issues by preventing these cable programmers from unreasonably refusing to deal with alternative multi-video providers. It will also prohibit these programmers from discriminating in price, terms and conditions in offering its programming. 138 CONG. REC. 6541 (daily ed. July 23, 1993)
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> **Mr. Markey** (FOR): Now, we have got to make sure they have access to programming, and that is all this amendment does is just make sure that there is a sale of the video programming from the cable industry for a reasonable price over to the satellite industry, plain and simple competition, the same thing we did when we forced the broadcasters to give their signals for free over to the cable industry back in the mid-seventies so that we could give birth to that industry. It is a very simple proposition, and by the way, by

the year 2000 it would obviate the need for any further rate regulation because you have real competition out in the marketplace ... 138 CONG. REC. 6538 (daily ed. July 23, 1993)

Mr. Shays (FOR): The best way to lower rates and better service is through competition. That is my preference. ... The cable operators tell me that is their preference too, but then they do everything they can to prevent competition. To start with, cable operators do not want telephone companies to provide cable services, but they also oppose the Tauzin Amendment which will allow satellite cable companies, wireless cable companies, and telephone companies access to the same programs the cable companies have access to. ... So what are we left with? A monopolistic industry that will continue to set its own price with nothing to restrain it. ... I urge my colleagues to open the door to true competition and support the Tauzin amendment. 138 CONG. REC. 6539 (daily ed. July 23, 1993)

Mr. Houghton (FOR): We now face the issue: What can we do to make a porous bill livable? And that is the Tauzin amendment. Specifically, it gives a break to people who want to get in this business .... It helps the rural satellite people who need to get in here and who would not be wired anyway by the cable companies. 138 CONG. REC. 6537 (daily ed. July 23, 1993)

Mr. Synar (FOR): Moreover, the Tauzin amendment prevents programmers that are vertically integrated with cable system operators from discriminating in the price, terms and conditions that they offer to competing cable system operators or alternative program distribution technologies. .... Just as Congress aided the infant cable industry to grow, it now should give the same consideration to fledgling technologies. .... Support the Tauzin amendment. Ensure competition in the cable industry and access to cable TV for all Americans. 138 CONG. REC. 6536 (daily ed. July 23, 1993)

Mr. Cooper (FOR): The Tauzin bill is supported by every competitor group that is out there: the satellite dish people, the telephone people, the wireless cable people, the other folks who want to have a chance to give us a choice in cable programming. The Manton approach, on the other hand, is supported by the giant monopolists. 138 CONG. REC. 6541 (daily ed. July 23, 1993)